Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE A. ZIMMERMAN and RICHARD ZIMMERMAN,
Petitioners,

v.

WILLIAM T. MANLEY, Acting Administrator, Agricultural Marketing Service, U.S. Dept. of Agriculture, and JOHN BLOCK, Secretary of Agriculture, U.S. Department of Agriculture

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM E. SHULL
Attorney at Law
4111 East 37th Street North
Wichita, KS 67220
(316) 832-5410
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Under 7 U.S.C. 499a and 499h, can an individual be denied employment in an area of governmental regulation solely because of his title or status with a business found in violation of certain regulations although he individually committed no violations, had no knowledge of the violations, and could not have detected said violations?

2. Does a "per se" or "irrebuttable" presumption interpretation of 7 U.S.C. 499a and 499h lead to an injust, unfair or absurd result not intended by Congress?

3. Does a "per se" or "irrebuttable" presumption interpretation of 7 U.S.C. 499a and 499h raise serious Constitutional questions in its application?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT:	
I. THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON AN IMPORTANT ISSUE OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT	4
II. THE "PER SE" OR "IRREBUTTABLE" PRESUMPTION INTERPRETATION OF 7 U.S.C. 499a BY THE EIGHTH CIRCUIT IS INCONSISTENT WITH LEGISLATIVE INTENT BECAUSE IT IS UNCONSCIABLE, UNJUST AND ABSURD	8
III. THE "PER SE" OR "IRREBUTTABLE" PRESUMPTION INTERPRETATION OF 7 U.S.C. 499a BY THE EIGHTH CIRCUIT IS INCONSISTENT WITH LEGISLATIVE INTENT BECAUSE IT RAISES SERIOUS CONSTITUTIONAL QUESTIONS	10
CONCLUSION	12
APPENDIX A—Opinion of the Court of Appeals	1a
APPENDIX B—7 U.S.C. 499a and 499h	3a

TABLE OF AUTHORITIES

Cases	Page
Adler v. Board of Education, 342 U.S. 485, 494-496, 72 S.Ct. 380, 96 L.Ed. 517 (1952)	9
Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971)	11
Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 18-19, 52 S.Ct. 103, 76 L.Ed. 136 (1931)	9
Birkenfield v. United States, 369 F.2d 491 (3rd Cir. 1966)	5
Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 405 (1963)	10
Eastern R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 138, 81 S.Ct. 523, 5 L.Ed.2d 464, 471	10
Fruit Salad Inc. v. Secretary of Agriculture, 451 F.2d 162 (1st Cir. 1971)	6
Griswold v. Connecticut, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678	10
Hagger Co. v. Helvering, 308 U.S. 389, 394, 60 S.Ct. 93, 84 L.Ed. 449 (1940)	8
In Re Griffiths, 413 U.S. 717, 37 L.Ed.2d 910, 93 S.Ct. 2851 (1973)	11
Minotto v. United States Department of Agriculture, 711 F.2d 406 (D.C. Cir. 1983)	4
N.A.A.C.P. v. Button, 371 U.S. 415, 430, 83 S.Ct. 328, 9 L.Ed.2d 405, 416-417 (1963)	10
Pupillo v. United States, 755 F.2d 638 (8th Cir. 1985)	2, 4, 5
Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975)	4, 9
State of Missouri v. National Organization for Women, 620 F.2d 1301 (8th Cir. 1980)	12
Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970)	9
United States v. American Trucking Assn., 310 U.S. 534, 543, 60 S. Ct. 1059, 84 L.Ed. 1345 (1940)	8
United States v. Colvin, 644 F.2d 703 (8th Cir. 1981)	11

TABLE OF AUTHORITIES—Continued

Page

United States v. Fitterer, 710 F.2d 1328 (8th Cir. 1983) 11
United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 11
White v. United States, 372 F.2d 513, 178 Ct. Cl. 765 (1967) 7
Zwick v. Freeman, 373 F.2d 110 (2nd Cir. 1967) .. 6

Statutes

7 United States Code 499a 4, 5, 6
7 United States Code 499h 4, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ———

CLYDE A. ZIMMERMAN and RICHARD ZIMMERMAN,
Petitioners,

v.

WILLIAM T. MANLEY, Acting Administrator, Agricultural Marketing Service, U.S. Dept. of Agriculture, and JOHN BLOCK, Secretary of Agriculture, U.S. Department of Agriculture

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Clyde A. Zimmerman and Richard Zimmerman, Petitioners, petition for a Writ of Certiorari to review the judgment filed on October 4, 1985 of the United States Court of Appeals for the Eighth Circuit. The Court of Appeals has stayed issuance of its mandate until January 27, 1986 to allow Petitioners to file a Writ of Certiorari.

OPINION

The opinion of the Court of Appeals is attached as Appendix A.

The opinion of the Department of Agriculture is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 4, 1985. Petitioners' timely Petition for Rehearing was denied on November 26, 1985. On December 26, 1985 the Court of Appeals granted Petitioners' Motion for Stay and Recall of Mandate. Petitioners were granted to and until January 27, 1986 to file a Petition for Writ of Certiorari.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

7 U.S.C. 499a and 499h (1976 and Supp. V 1981) are set forth at Appendix B.

STATEMENT

Petitioners have appealed from the decision of the Department of Agriculture finding that they were "responsibly connected" with Yankee Brokerage, Inc., whose produce brokerage license was revoked in 1983. The Petitioners served as officers and/or directors at various times for the company.

The decision of the Agriculture Department means that neither Petitioner may be employed in any capacity for two years by a company engaged in or connected with the sale of fresh produce.

The Eighth Circuit Court of Appeals, relying on *Pupillo v. United States*, 755 F.2d 638 (8th Cir. 1985), affirmed the decision of the Department of Agriculture.

The Petitioners were employed by Yankee Brokerage, Inc., a corporation engaged in the marketing of fresh produce and subject to regulation by the United States Department of Agriculture. Their father, Roy Zimmerman, was the president, principal stockholder and domineering force within the company.

At various times during their employment, each Petitioner was told by their father that they had been named an officer and/or director of the company. Neither petitioner had sought the office nor received any additional compensation, duties or benefits. Board of Directors meetings were not held.

Neither Petitioner participated in any type of management decision, financial decision nor any other action compatible with the title of officer or director of a company. Neither could initiate checks, hire or fire personnel, open new accounts, or enter into any contractual obligation. Neither Petitioner had any training or education as to the duties of an officer and/or director. Standard resolutions and minutes were presented to them by the company's outside attorney who assured each Petitioner of their propriety and they were told to sign the documents. None of the documents assisted or aided the violation of the Department of Agriculture regulations by the corporation.

Their father maintained all company financial records and apparently falsified them so the company's true financial status was concealed both from the Petitioners and from the company's outside accountant. There were no signs of financial instability or weakness.

Two attorneys who had worked for the company's outside law firm confirmed the domineering role of the father, the lack of corporate meetings and the lack of knowledge of the Petitioners as to any wrong doing.

The father disappeared in October of 1981. Petitioners then discovered that their father had been skimming money to support another business and that the brokerage company's deficit exceeded one million dollars. The company was unable to pay its shippers and the license granted under the Perishable Agricultural Commodities Act (7 U.S.C. Sec. 499a et seq.) was revoked.

The act also provides that any person who has been "responsibly connected" with a company whose license has been revoked may not be employed in the agricultural commodities industry for two years after the revocation although special permission may be granted at the end of one year upon posting an appropriate bond. 7 U.S.C. 499b and 499h.

A person is presumed to be responsibly connected with the company if the individual has been an officer, director or holder of more than 10 per cent of the stock. 7 U.S.C. 499a(9).

In this cause and in *Pupillo v. United States*, 755 F.2d 638 (8th Cir. 1985), the United States Court of Appeals for the Eighth Circuit adopted a per se interpretation of the act. The District of Columbia Circuit has held the presumption to be rebuttable. *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975); *Minotto v. United States Department of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983).

The "per se" interpretation means that anyone who was an officer, director, etc., is barred per se from future employment in the produce field, regardless of fault, knowledge or culpability. The "rebuttable" presumption bars an individual unless he can show lack of fault, knowledge or culpability.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON AN IMPORTANT ISSUE OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The Perishable Agricultural Commodities Act (7 U.S.C. Sec. 499 et seq.) regulates the shipment of perishable agricultural products in interstate and foreign commerce through a system of licensing and supervision. As a condition of doing business, dealers or brokers in such com-

modities must first obtain a license from the Department of Agriculture.

The license may be suspended or revoked for violation of various administrative rules, including failing to make prompt and full payment for commodities purchased from growers or shippers.

The act also provides that any person who has been "responsibly connected" with a company whose license has been revoked may not be employed in the agricultural commodity industry for two years after the revocation.

Under 7 U.S.C. Sec. 499a, an individual is *presumed* to be responsibly connected with a produce brokerage company (and therefore unemployable for two years) if the individual has been an officer, director or holder of more than 10 per cent of the outstanding stock of a brokerage company whose license has been revoked.

Whether this "presumption" is rebuttable or is irrebuttable has been decided in conflicting ways between United States Courts of Appeal.

The United States Court of Appeals for the District of Columbia, for example, has ruled that being a stockholder, director or officer of a culpable brokerage company was only *prima facie* evidence of responsible connection and the employee had the right to rebut such evidence. *Minotto v. United States Department of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975).

On the other hand, the United States Court of Appeals for the Eighth Circuit has ruled that the presumption is irrebuttable and that the holding of any of the named positions is *per se* grounds to bar an individual from employment in the industry, regardless of knowledge, culpability, intent or wrongdoing. *Pupillo v. United States*, 755 F.2d 638 (8th Cir. 1985). A similar finding was made in *Birkenfield v. United States*, 369 F.2d 491 (3rd

Cir. 1966) and *Zwick v. Freeman*, 373 F.2d 110 (2nd Cir. 1967).

The United States Court of Appeals for the First Circuit has not decided the precise issue before this Court but has suggested that the purpose of 7 U.S.C. Sec. 499h is to allow the Department of Agriculture to apply the "proper sanction" to "responsible officials of the violator". *Fruit Salad Inc. v. Secretary of Agriculture*, 451 F.2d 162 (1st Cir. 1971).

The "per se" standard was applied in the present case against the Petitioners.

This conflict raises important questions of Federal law that should be resolved by this Court in at least two areas.

First, the efforts of the Department of Agriculture to enforce 7 U.S.C. Sec. 499a are hampered until the nature of the presumption is clarified. Presently, individuals who receive an adverse ruling from within the Department of Agriculture may file a Petition for Review in either the judicial circuit in which they reside or in the United States Court of Appeals for the District of Columbia by virtue of the venue provisions of 18 U.S.C. Sec. 2343. The conflict in the decisions that presently exists will preempt all of the circuits except the District of Columbia because individuals will seek the more favorable standard of review offered in the D.C. circuit.

Second, the "per se" or "irrebuttable" presumption position of section 499a(9) adopted by the Second, Third and Eighth circuits imposes a Draconian penalty that is unparalleled in Federal judicial experience and must be addressed by this Court. It bars an individual from employment in a particular field because of the wrongdoing of another, *even if the individual did not participate in the wrongdoing, did not facilitate the wrongdoing, did not have knowledge of the wrongdoing and did not even have the ability to detect the wrongdoing.*

Quite simply, Petitioners' research suggests that this is the harshest interpretation of any federal or state regulation presently in existence. No other statute, law or ordinance can be found that has been applied in such an unyielding manner as the present one. Such a result could not have been the intent of Congress.

The per se rule, if unchanged, even surpasses the extraordinary ability of the Internal Revenue Service to assess a corporation officer for a corporation's back taxes. 26 U.S.C. 6671(b). In such tax cases, a "responsible person" must at least have had some ability to direct the expenditure of tax funds. *White v. United States*, 372 F.2d 513, 178 Ct. Cl. 765 (1967). A mere title or position is not sufficient under tax laws and should not be tolerated under the present facts.

Petitioners would also note that prior to this case, even the circuits following the per se rule have tried to soften the incredibly harsh application of the irrebuttable presumption by incidental findings that the individuals seeking relief were culpable in one form or another. In *Pupillo*, for example, the Court found that "Pupillo was, as night boss, second in command at Friedmeyer, and knew of the company's financial difficulties and creditors' demands for payment." 755 F.2d at 644.

No such evidence exists in the Petitioners' case nor did the Circuit Court make any finding or suggestion of culpability in its opinion (Appendix A) which makes this a factual situation that demands review by this Court.

The Petitioner would respectfully suggest that the Writ should be granted as clearly within the character of reasons set forth in Supreme Court Rule 17.

II. THE "PER SE" OR "IRREBUTTABLE" PRESUMPTION INTERPRETATION OF 7 U.S.C. 499a BY THE EIGHTH CIRCUIT IS INCONSISTENT WITH LEGISLATIVE INTENT BECAUSE IT IS UNCONSCIABLE, UNJUST AND ABSURD.

The position of the Circuit Courts that hold that the presumption in 7 U.S.C. Sec. 499a is irrebuttable ignores well settled canons of statutory interpretation and construction.

This Court has consistently held that the construction of a statute that leads to unjust or absurd consequences should be avoided. *United States v. American Trucking Assn.*, 310 U.S. 534, 543, 60 S. Ct. 1059, 84 L.Ed. 1345 (1940); *Hagger Co. v. Helvering*, 308 U.S. 389, 394, 60 S.Ct. 93, 84 L.Ed. 449 (1940);

The irrebuttable or per se application creates unjust, unconscionable and absurd results. The application bars an individual from employment in the produce field even though he personally committed no wrongful acts, had no knowledge whatsoever of any wrongful acts, and could not even have discovered the wrongdoing if the evidence had been diligently sought after.

This is made emphasized by the facts in the present case. Petitioners were employed by their father who was the president, principal stockholder and domineering force within the company. They were as told by their father that they had been named an officer and/or director of the company. Neither petitioner received any additional compensation, duties or benefits. Board of Directors meetings were not held.

Neither Petitioner participated in any type of management decision, financial decision nor any other action traditionally associated with an officer or director of a company. Standard resolutions and minutes were presented to them by the company's outside attorney who assured each Petitioner of their propriety. None of the

documents assisted or aided the violation of the Department of Agriculture regulations.

Their father maintained all company financial records and falsified them so the company's true financial status was concealed both from the Petitioners and even from the company's accountant. There were no signs of financial instability or weakness.

Two attorneys who had worked for the company's outside law firm confirmed the lack of knowledge of the Petitioners as to any wrong doing.

Despite even the hint of impropriety, culpability or inaction on behalf of the Petitioners, the per se application automatically bars them from any employment in the produce field where they have both worked since they were teenagers. They have no other vocational skills and individually have an excellent reputation in the produce industry.

Such an interpretation is clearly so harsh as to be absurd, unfair and even unconscionable when compared with alternative interpretations that achieve the same legislative intent. In *Quinn v. Butz*, 510 F.2d 743 at 755-756 (1975), the D.C. Circuit exhaustively discussed the alternative interpretations that fully met the needs of the Department of Agriculture, were more consistent with other expressions of Congressional intent and were much fairer.

It is also important to note that Congress has frequently used rebuttable presumptions and inferences to meet similar situations and there is nothing in the legislative history of the Perishable Agricultural Commodities Act that would suggest or require a harsher interpretation. See, for example, *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); *Adler v. Board of Education*, 342 U.S. 485, 494-496, 72 S.Ct. 380, 96 L.Ed. 517 (1952); *Bandini Petroleum Co. v. Superior*

Court, 284 U.S. 8, 18-19, 52 S.Ct. 103, 76 L.Ed. 136 (1931).

III. THE "PER SE" OR "IRREBUTTABLE" PRESUMPTION INTERPRETATION OF 7 U.S.C. 499a BY THE EIGHTH CIRCUIT IS INCONSISTENT WITH LEGISLATIVE INTENT BECAUSE IT RAISES SERIOUS CONSTITUTIONAL QUESTIONS.

The law is well settled that where alternative interpretations of a statute are possible, a court must give effect to the interpretation that does not raise constitutional questions. *N.A.A.C.P. v. Button*, 371 U.S. 415, 430, 83 S.Ct. 328, 9 L.Ed.2d 405, 416-417 (1963); *Eastern R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 138, 81 S.Ct. 523, 5 L.Ed. 2d 464, 471.

There are at least two possible interpretations of 7 U.S.C. Sec. 499a(9). The per se or irrebuttable presumption utilized by the Eighth Circuit raises serious Constitutional questions under the First, Fifth and Fourteenth Amendments to the United States Constitution.

For example, the Petitioners are being denied employment in their chosen field of endeavor solely because they were associated with an individual who violated PACA rules. Their only "act" of cupability was the holding of a title. There is no evidence that they furthered the violations, assisted in them, had knowledge of them, or even could have had knowledge of them. In fact, the evidence shows that they were shown falsified financial records that verified that no violations had occurred.

The First Amendment protects an individual's right to associate with whomever he pleases, even in business or economic positions. *N.A.A.C.P. v. Buttons*, supra; *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 84 S. Ct. 1113, 12 L.Ed. 2d 405 (1963). See also dicta in *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678.

Association with a group that breaks the law or advocates breaking the law cannot be penalized unless it is affirmatively shown that the individual had more than mere membership or perfunctory participation, i.e. guilt by association was unacceptable. *Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971) and cases therein.

The Fifth and Fourteenth Amendments come into play because the per se interpretation prevents the Petitioners from working in the area of their choice without any showing wrongful conduct, cupability, or compelling state interest. *In Re Griffiths*, 413 U.S. 717, 37 L.Ed.2d 910, 93 S.Ct. 2851 (1973); *Baird v. State Bar of Arizona*, supra; *United States v. Robel*, 389 U.S. 258, 88 S. Ct. 419, 19 L.Ed.2d 508. In other words, they are being punished for the acts of others without just cause or excuse and are being denied due process of law.

The "rebuttable" presumption interpretation avoids these Constitutional problems but still gives the Department of Agriculture the ability to enforce its rules and regulations in an effective manner.

It is also well settled that a statute, law or regulation is "penal" in nature if it provides for penalties, forfeitures, revocations or suspensions. 73 Am.Jur.2d "Statutes", Sec. 293, Pg. 452.

Such statutes must be *strictly construed* and leniency shown to those affected when questions of interpretation are involved. *United States v. Fitterer*, 710 F.2d 1328 (8th Cir. 1983); *United States v. Colvin*, 644 F.2d 703 (8th Cir. 1981).

The per se interpretation of 7 U.S.C. Sec. 499a(9) is inconsistent with that rule because the Courts elect to use the most penal of two interpretations to a statute.

The per se standard bars an individual from working in the fresh produce field without any showing of guilt

or cupability. An alternative interpretation, equally supported by legislative intent, grants the right to an individual to rebut the presumption of misconduct and therefore protects the innocent.

The per se interpretation is also in conflict with the Eighth Circuit's own decision in *State of Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980). The *NOW* case held that a court cannot impute to Congress an intent to invade a constitutional right. 620 F.2d at 1318-19. Yet the Court's present holding imputes violations of First, Fifth and Fourteenth Amendment rights noted above.

CONCLUSION

Petitioners respectfully submit to this Court that this cause involves a decision that conflicts with decisions in other circuits, involves important and recurring questions of federal law which should be settled by this Court, creates unconscionable judicial interpretations of a statute and that the decision below was in error and that justice requires the intervention of this Court.

Respectfully submitted,

WILLIAM E. SHULL
Attorney at Law
4111 East 37th Street North
Wichita, KS 67220
(316) 832-5410
Counsel for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2433

CLYDE A. ZIMMERMAN and RICHARD ZIMMERMAN,
Petitioners,

v.

WILLIAM T. MANLEY, Acting Administrator, Agricultural Marketing, U.S. Department of Agriculture and JOHN BLOCK, Secretary of Agriculture, U. S. Department of Agriculture,
Respondents.

Submitted: September 9, 1985
Filed: October 4, 1985

Review of Orders of the
United States Department of Agriculture,
Agricultural Marketing Service

Before ROSS, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

PER CURIAM.

Upon a careful consideration of the record, the briefs, and arguments of the parties, the Court has concluded that the orders of the Agricultural Marketing Service, an agency of the United States Department of Agricul-

ture, are supported by substantial evidence on the record as a whole, that no error of law appears, and that an opinion would have no precedential value. The orders are hereby affirmed on the basis of *Pupillo v. United States*, 755 F.2d 638 (8th Cir. 1985). *See* 8th Cir. R. 14.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

§ 499a. Definitions

When used in this Act [7 USCS §§ 499a et seq.]—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia;

(4) The term "perishable agricultural commodity"—

(A) Means any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character; and

(B) Includes cherries in brine as defined by the Secretary in accordance with trade usages;

(5) the term "commission merchant" means any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another;

(6) The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail

shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of $100,000; and (C) no person buying any commodity for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph (4) of this section. Any person not considered as a "dealer" under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 3 [7 USCS § 499c], and in such case and while the license is in effect such person shall be considered as a "dealer";

(7) The term "broker" means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a "broker" if such person is an independent agent negotiating sales for and on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of $100,000 in any calendar year.

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside

of the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act [7 USCS §§ 499a et seq.]

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association;

(10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

(June 10, 1930, c. 436, § 1, 46 Stat. 531; Apr. 13, 1934, c. 120, § 1, 48 Stat. 584; Aug. 20, 1937, c. 719, § 1, 50 Stat. 725; June 29, 1940, c. 456, §§ 1, 2, 54 Stat. 696; Oct. 1, 1962, P. L. 87-725, §§ 1, 2, 76 Stat. 673; Nov. 4, 1969, P. L. 91-107, §§ 1, 2, 83 Stat. 182.)

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary. Whenever (a) the Secretary determines, as provided in section 6 [7 USCS § 499f], that any commission merchant, dealer, or broker has violated any of the provisions of section 2 [7 USCS § 499b], or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act [7 USCS § 499n(b)], the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties. Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2 [7 USCS § 499b], but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 7(c) [7 USCS § 499g(c)].

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 2 [7 USCS § 499b], if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this Act [7 USCS §§ 499a et seq.] and that the licensee will pay all reparation awards, subject to its right of appeal under section 7(c) [7 USCS § 499g(c)], which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the

bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

(c) Fraud in procurement. If, after a license shall have been issued to an applicant, the Secretary believes that the license was obtained through a false or misleading statement in the application therefor or through a misrepresentation, concealment, or withholding of facts respecting any violation of the Act [7 USCS §§ 499a et seq.] by any officer, agent, or employee, he may, after thirty days' notice and an opportunity for a hearing, revoke said license, whereupon no license shall be issued to said applicant or any applicant in which the person responsible for such false or misleading statement or misrepresentation, concealment, or withholding of facts is financially interested, except under the conditions set forth in paragraph (b) of section 4 [7 USCS § 499d(b)].

(d) Injunction. In addition to being subject to the penalties provided by section 3(a) of this Act [7 USCS § 499c(a)], any commission merchant, dealer, or broker who engages in or operates such business without a valid and effective license from the Secretary shall be liable to be proceeded against in any court of competent jurisdiction in a suit by the United States for an injunction to restrain such defendant from further continuing so to engage in or operate such business, and, if the court shall find that the defendant is continuing to engage in such business without a valid and effective license, the court shall issue an injunction to restrain such defendant from continuing to engage in or to operate such business without such license.

(June 10, 1930, c. 436, § 8, 46 Stat. 535; Apr. 13, 1934, c. 120, § 14, 48 Stat. 588; Aug. 20, 1937, c. 719, § 11, 50 Stat. 730; July 30, 1956, c. 786, § 5, 70 Stat. 727; Oct. 1, 1962, P. L. 87-725, § 11, 76 Stat. 675.)

Supreme Court, U.S.
FILED
FEB 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE A. ZIMMERMAN and RICHARD ZIMMERMAN,
Petitioners,

v.

WILLIAM T. MANLEY, Acting Administrator, Agricultural Marketing Service, U.S. Dept. of Agriculture, and JOHN BLOCK, Secretary of Agriculture, U.S. Department of Agriculture

---

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM E. SHULL
Attorney at Law
4111 East 37th Street North
Wichita, KS 67220
(316) 832-5410
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

SUPPLEMENTAL APPENDIX
TABLE OF CONTENTS

Page

Decision of Dept. of Agriculture
In Re: Clyde Zimmerman SA-1

Decision of Dept. of Agriculture
In Re: Richard Zimmerman SA-13

Order Denying Petition for Review
In Re: Clyde Zimmerman SA-23

Order Denying Petition for Review
In Re: Richard Zimmerman SA-24

Eighth Circuit Denial of Rehearing Petition SA-25

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

DECISION

PACA RC 82-1030

IN RE: CLYDE A. ZIMMERMAN,
Petitioner

PRELIMINARY STATEMENT

This is a proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) and the applicable Rules of Practice (7 C.F.R.), Section 47.1; 47.2(a) through (h); 47.46; and 47.47 *et seq.*, which pertain to the administrative determination of whether a person is or was "responsibly connected" with a licensee under the Act. This proceeding is held to determine if the Petitioner was "responsibly connected" with Yankee Brokerage, Inc., a Missouri corporation, and a licensee under the Act at the time Yankee Brokerage, Inc. purchased 363 lots of perishable agricultural commodities from 61 sellers, in interstate commerce, and failed to make full payment promptly of the agreed purchase prices.

A disciplinary proceeding was instituted under the Perishable Agricultural Commodities Act by a complaint filed on October 8, 1982, against Yankee Brokerage, Inc. in PACA Docket No. 2-6130. It was alleged that Yankee Brokerage, Inc., during the period of May 1981 through November 1981, purchased 363 lots of perishable agricultural commodities from 61 sellers in interstate commerce and failed to make full payment promptly of the agreed purchase prices in the total amount of $975,833.21.

On December 30, 1982, Administrative Law Judge William J. Weber issued a decision and order, effective February 9, 1983, finding that respondent had committed willful, flagrant, and repeated violations of Section 2 of the Act.

A hearing was held in PACA RC 82-1030, on August 25, 1983, in Kansas City, Missouri, to determine whether Clyde A. Zimmerman was an individual "responsibly connected" with Yankee Brokerage, Inc. during the period of May 1981 through November 1981. Clyde A. Zimmerman was represented by Mr. William E. Shull, Kearney, Missouri. Mr. Edward M. Silverstein, Office of the General Counsel, represented the Agency. The hearing was held before Harry L. Williams who had been designated the Presiding Officer. The Petitioner and the Agency elected to file briefs.

FINDINGS OF FACT

1. Yankee Brokerage, Inc., a Missouri corporation, had as its business address Post Office Box 12458, North Kansas City, Missouri.

2. Petitioner became a salesman for Yankee Brokerage, Inc., "Somewhere around 1972-73." As a salesman, he would contact suppliers of produce for the purpose of brokering that produce to firms in the Kansas City, Missouri area. He sold some 50 loads of produce each month.

3. The PACA License Renewal Application bearing a date of August 14, 1974, shows that Clyde A. Zimmerman was made Treasurer and a Director of Yankee Brokerage, Inc. on August 1, 1974. (Ex. A-3)

4. The License Renewal Application, bearing a receiving date of August 8, 1977, shows that Clyde A. Zimmerman was made the Executive Vice-President in addition to Treasurer and a Director of Yankee Brokerage, Inc. on January 1, 1977. (Ex. A-5)

5. The Minutes of Annual Meeting of the Board of Directors of Yankee Brokerage, Inc., dated March 7, 1978, reflects the election of Clyde Anthony Zimmerman as Vice-President and Treasurer. (Ex. A-12)

6. The License Renewal Application, bearing a renewal date of July 6, 1981, shows that Petitioner was no longer an officer or director of Yankee Brokerage, Inc., effective July 1, 1981. (Ex. A-9)

7. A Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated March 13, 1979, was signed by Clyde A. Zimmerman. The action of the officers of the corporation in their official capacity were approved and officers for the ensuing year were elected, including Petitioner. The salary of Roy F. Zimmerman was approved at $80,000 a year. (Ex. A-14)

8. The Minutes of a Special Meeting of the Board of Directors Yankee Brokerage, Inc. indicates that Petitioner participated in the January 18, 1980, meeting as a director at which a resolution was adopted to take out $250,000 in insurance on Petitioner. A Call and Waiver of Notice, signed by Petitioner as a director, waived notice of the meeting, accepted the minutes, and authorized and approved the corporation's acts as recorded. (Ex. A-15)

9. A Waiver of Notice of Annual Meeting of Shareholders and Shareholders Consent to Action Without Formal Meeting, dated March 11, 1980, contains a resolution which called for the election of Petitioner as a director of the corporation for the ensuing year. (Ex. A-16)

10. A Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated March 11, 1980, adopted a resolution which called for the election of Clyde Anthony Zimmerman as Vice-President and Treas-

urer of the corporation for the ensuing year. Petitioner signed the document. (Ex. A-17)

11. A Waiver of Notice of Special Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated August 11, 1980, contained an adopted resolution that authorized action to have all salaried officers covered by workmen's compensation insurance. Petitioner signed the document. (Ex. A-18)

12. Clyde Anthony Zimmerman resigned as Vice-President, Treasurer, and as a Director of Yankee Brokerage, Inc. effective June 11, 1981. (Ex. A-19)

13. The Minutes of Special Meeting of Shareholders of Yankee Brokerage, Inc., dated October 13, 1981, records the resignation of Petitioner as Vice-President, Treasurer, and a member of the Board of Directors of the firm. Clyde Anthony Zimmerman was appointed to the position of special consultant to ". . . assist the officers of the corporation in attempting to clarify the financial situation of the business and to maintain its solvency." (Ex. A-20)

14. The Minutes of Special Meeting of the Board of Directors of Yankee Brokerage, Inc., dated October 13, 1981, reflects an action to enter into a contract with Petitioner who would be retained as a special consultant to assist the officers in reorganization, reconstruction, and day-to-day operation of the firm. (Ex. A-21)

15. On November 6, 1981, letters were sent to the creditors of Yankee Brokerage, Inc. seeking their assistance in trying to resolve the firm's financial difficulties. The letters were signed by Petitioner. A second series of letters, dated December 22, 1981, and signed by Petitioner, were also sent to the creditors seeking acceptance of a proposal to permit the firm's continuation in business. (A-22)

16. An administrative complaint was filed by the Agency on October 8, 1982, in which it was alleged that the firm had failed to make full payment promptly for 363 lots of perishable agricultural commodities from 61 sellers in the total amount of $975,833.21 during the period of May 1981 through November 1981.

17. The license of Yankee Brokerage, Inc. was revoked by Administrative Order in PACA Docket No. 2-6130 effective February 9, 1983.

18. Mr. J.J. Gardner, Chief, Regulatory Branch, Fruit and Vegetable Division, notified Mr. Clyde A. Zimmerman, by certified letter dated October 19, 1982, that a disciplinary complaint had been filed against Yankee Brokerage, Inc. and that as an officer, or director, or owner of more than ten percent of the corporation's stock, he was deemed to be responsibly connected. (Ex. A-23)

19. Petitioner, through his attorney, William S. Shull, submitted an answer received by the Agency on November 23, 1982, in which he denied being a "responsible person" with Yankee Brokerage, Inc. (Ex. A-24)

20. Mr. J.J. Gardner, by letter dated December 22, 1982, to Petitioner's attorney, held that Petitioner was responsibly connected with Yankee Brokerage, Inc. (Ex. A-25)

21. Petitioner, through his attorney, filed a petition for review of that determination, dated January 25, 1983, requested an oral hearing.

22. An oral hearing was held in Kansas City, Missouri, on August 25, 1983, to provide Petitioner an opportunity to present evidence to refute or rebut the determination by Mr. Gardner of "responsible connection".

CONCLUSIONS

The Perishable Agricultural Commodites Act, 1930, as amended, defines the term "responsibly connected" to mean affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association.

The issue in this proceeding is whether Clyde A. Zimmerman was "responsibly connected" with Yankee Brokerage, Inc. during the period of May through October 1981.

Petitioner testified that he started working for Yankee Brokerage, Inc. (Yankee), "Somewhere around 1972-73." (Tr. 5) His initial position with the firm was that of a salesman with duties to call shippers, primarily in the State of Washington, to get prices, then call Yankee customers in the Kansas City area and broker the product and then to write up the loads. (Tr. 6) He testified that he became an officer in the firm in 1974 when ". . . another gentleman . . . retired and was an officer . . ., I was told I was going to take his place as an officer." Petitioner became the Treasurer and a Director of Yankee (Tr. 6) In 1977 when another person left the firm, he was then made Executive Vice-President of Yankee. (Tr. 7)

Petitioner testified that even though he held those positions of Executive Vice-President, Treasurer, and Director of Yankee, the duties and responsibilities did not change. He continued as a salesman. He stated that his father, Roy F. Zimmerman, told him that he would be appointed to those positions; that he had not asked for the positions, nor did he receive additional compensation.

Roy F. Zimmerman owned 92 percent of the Yankee stock and he was described by Petitioner as ". . . very strong willed . . . and ruled with an iron hand . . . we were told you will do something this way and you did it. There was no argument about it, you either did it or

you could leave . . ." Most of the family was employed by Yankee or the truck line, also owned by Roy F. Zimmerman, in 1981.

The record contains copies of reports of Annual Meetings of the Board of Directors of Yankee. The Minutes of the meeting of the Board of Directors held on March 7, 1978, contains resolutions that were adopted which provided for establishing bank accounts and the fixing of Roy F. Zimmerman's salary at $5,000 per month. The meeting of March 13, 1979, ratified the actions of the officers during the preceding year and fixed Roy F. Zimmerman's salary at $80,000 per year. A special meeting of the Board of Directors, held on January 18, 1980, provided for a life insurance program for firm members including Petitioner who was to be insured for $250,000. A second meeting in 1980, held August 11, was for the purpose of authorizing action to provide for workmen's compensation insurance for each officer. Each of the reports of Minutes of Meeting, including those additional reports that ratified the officers' actions for the preceding year, was signed by Petitioner.

Petitioner produced several witnesses who testified about the control exerted by Roy F. Zimmerman over the business activities of Yankee. John Chick, an attorney, was formerly employed by the Joseph Y. DeCuyper law firm that represented Yankee and Mr. DeCuyper was Secretary and a Director of the Yankee firm. Mr. Chick worked for the law firm for some eight years beginning in 1972. He testified that the law firm prepared Yankee's corporate minutes by a mechanical system and that, to the best of his knowledge, no director or shareholder meetings were ever held. (Tr. 49-50) However, on cross examination, he could not state with any certainty that the meetings were not held. (Tr. 57-58) When asked about Roy F. Zimmerman's relationship with his children, he testified that he would ". . . make all kinds of crazy deals, that these kids had to live with and try to work their

way out of." (Tr. 59) He stated that Roy F. Zimmerman's children acted as salesmen, "They would call and do the buying and selling, or whatever was brokered, the fruits and vegetable." (Tr. 61) He stated ". . . Roy Zimmerman, ran that company with a very iron hand and not covered with any kind of velvet glove. It was very much a dominating situation because of not only him physically, but him as a personality." (Tr. 61)

Steven Crain, also an attorney who was employed by the DeCuyper law firm from 1970 to 1976, gave testimony very similar to that of Mr. Chick. He testified that Roy Zimmerman controlled the company and stated that "Roy was almost like a biblical patriarch. He might have handed out the titles to his children and he was glad to have them in the business . . . but there was never a moment that I was around Zimmerman where he wasn't telling everyone . . . that he was the total business". (Tr. 75-76)

Richard Zimmerman, a brother of Petitioner, testified that he had worked for Yankee, first as a part-time employee, and then as a full-time employee beginning in 1975. He was employed as a salesman and was advised that he had become a member of the Board of Directors of Yankee. (RTr. 6)[1] He stated that ". . . in matters of business, Roy just told me what to do and I would you know, I did them." (RTr. 7) He stated that as a Director of Yankee, he was never called upon to make any type of management decision. (RTr. 7) He said that even if he had known of his responsibilities as a Director of the corporation, he would still have accepted that position. (RTr. 12) He resigned as a Director in October 1981 when he became aware of ". . . what kind of light" in which the Director's position placed him.

---

[1] It was agreed prior to the hearing, by each party's attorney, that the testimony of each witness would be incorporated in each proceeding, PACA RC-1030 and PACA RC-1031. The transcript references: PACA RC 82-1031 will be designated as RTr.

Petitioner produced two other witnesses, David B. Zimmerman, another brother who was also employed by Yankee, and Robert C. Reinholt, a partner in a produce firm that did business with Yankee. Both testified as to the strong hand of Roy Zimmerman in controlling Yankee.

Petitioner contends that Yankee was nothing more than the alter ego of Roy Zimmerman and that Petitioner served only as a nominal officer with no power in management and operation of the firm. Petitioner has advanced considerable argument in support of piercing the corporate veil to show that Yankee was nothing more than the one man corporation of Roy Zimmerman.

The courts have held ". . . it is the use to which the corporate form is put which controls and the facts in each particlular case will determine the course of relief", *Francis O. Day Co.* v. *Shapiro*, 267 F. 2d 669, 674. The general rule is that the corporate entity should be upheld unless specific, unusual circumstances call for looking beyond the corporate structure, *Anderson* v. *Abbott*, 321 U.S. 349, 362, *Paumier* v. *Barge Bt.*, 1793, 395 F. Supp. 1019.

Yankee was a Missouri corporation of long standing and it was a closely held family corporation that provided employment for Roy Zimmerman and most of his immediate family. He brought his sons into the firm as salesmen to represent the firm in dealing with sellers and buyers of produce. Petitioner became an employee of Yankee "Somewhere around 1972-73" (Tr. 5) as a salesman with duties of contacting customers in Washington State to obtain prices and then to contact customers in the Kansas City area to broker the product. In 1974, he was made Treasurer and a Director of the firm and in 1977, he was made the Executive Vice-President of Yankee. The official file contains copies of Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, Minutes of a Special Meeting of the Board of Directors

Yankee Brokerage, Inc., and Waiver of Notice of Special Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting. Each of the official corporate documents was signed by Petitioner in his capacity as a Director of Yankee. The director's actions reflected substantive actions on behalf of Yankee. Petitioner served as an officer and Director of Yankee for some seven years.

Petitioner's witness, Mr. Chick, testified as to the initiative demanded of Yankee's salesmen. When in describing Roy Zimmerman's relationship with his children, he stated that Roy ". . . would make all kinds of crazy deals, that these kids had to then live with and try to work their way out of . . ." (Tr. 59) Even Petitioner's witness recognized the latitude provided Yankee's salesmen in making business decisions on behalf of the firm.

In *Christian and Porter Aluminum Co.*, 584 F. 2d 326, 338 (9th Cir. 1978), the court stated "The party seeking to have the corporate entity disregarded has the burden of proving that the alter ego theory should be applied." After a review of all the evidence, it is concluded that Petitioner has not overcome that burden.

Petitioner was a representative of Yankee for some eight years. He was Treasurer and Director for at least seven years and made Executive Vice-President in 1977, all positions with substantial responsibility. In a closed family corporation, it is inconceivable that Petitioner was nothing more than a figurehead, as he would have us believe, particularly in light of the working conditions at Yankee as described by Richard Zimmerman. When asked how far Roy Zimmerman was physically from him when he was doing ". . . telephone sale work?", he answered, "He sat right in the middle. He had a circular desk with an opening in the middle and we all sat around Roy . . . He could reach over and touch me, maybe two feet." Under such working conditions, it is difficult

to envision Roy Zimmerman working in a total vacuum making all of the business and management decisions devoid of any input from the other corporate officers and directors.

In *Birkenfield* v. *U.S.*, 369 F. 2d 493, (3rd Cir. 1966), the court held Birkenfield responsibly connected. In that case, Birkenfield had been Treasurer, a member of the board of directors of the Ft. Pitt Tomato & Produce Co., Inc. and had owned more than ten percent of the company's outstanding shares of stock. The thrust of Birkenfield's contention before the Department, as well as in the District Court, was that he was only nominally such an official or shareholder, and that actual authority was vested in others. The court stated:

> Surely, the relationships of director, officer, or substantial shareholder form a sufficient nexus for the arbitrary conclusion of responsible connection . . . The fact that an individual has not exercised "real" authority in the sanctioned company is not controlling . . .

In *Quinn* v. *Butz*, 510 F. 2d, 743 at 756, the court stated in commenting on the Birkenfield decision that:

> We do not consider our construction of 1(9) inconsistent with either of the two decisions upon which appellees endeavor to support the position that a conclusive presumption is provided . . . In *Birkenfield* v. *United States* . . . where one who admittedly had been a treasurer, director and a 10%-plus stockholder of an offending corporate licensee asserted that "he never had real responsibility in the corporation's affairs." The court held merely that "(T)he automatic exclusion of 'responsibly connected' persons is not irrational or arbitrary under the circumstances".

Petitioner was content to remain an officer and director of Yankee for more than seven years. It was only after the firm encountered financial problems that he chose to

resign from those positions. He remained with the firm as a salesman because if he had left ". . . I would have left a big hole in their sales, at that point. I was selling 50 loads of produce a month . . ." (Tr. 15)

In *Quinn* v. *Butz*, 510 F. 2d 743 at 760, the court established the principle that a Petitioner should be afforded the opportunity to rebut the Agency determination of responsible connection. Petitioner was afforded that opportunity. I do not believe Petitioner has sustained that burden in this proceeding. Under the circumstances, Petitioner must be held "responsibly connected" with Yankee.

DECISION

Petitioner, Clyde A. Zimmerman, was responsibly connected under the Perishable Agricultural Commodities Act with Yankee Brokerage, Inc. during the period of May and June 1981.

Done at Washington, D.C., this 1st day of March 1984.

/s/ Harry L. Williams
HARRY L. WILLIAMS
Presiding Officer

SA-13

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

DECISION

PACA RC 82-1031

IN RE: RICHARD S. ZIMMERMAN,
Petitioner

PRELIMINARY STATEMENT

This is a proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) and the applicable Rules of Practice (7 C.F.R.), Section 47.1; 47.2(a) through (h); 47.46; and 47.47 *et seq.*, which pertain to the administrative determination of whether a person is or was "responsibly connected" with a licensee under the Act. This proceeding is held to determine if the Petitioner was "responsibly connected" with Yankee Brokerage, Inc., a Missouri corporation, and a licensee under the Act at the time Yankee Brokerage, Inc. purchased 363 lots of perishable agricultural commodities from 61 sellers, in interstate commerce, and failed to make full payment promptly of the agreed purchase prices.

A disciplinary proceeding was instituted under the Perishable Agricultural Commodities Act by a complaint filed on October 8, 1982, against Yankee Brokerage, Inc. in PACA Docket No. 2-6130. It was alleged that Yankee Brokerage, Inc., during the period of May 1981 through November 1981, purchased 363 lots of perishable agricultural commodities from 61 sellers in interstate commerce

and failed to make full payment promptly of the agreed purchase prices in the total amount of $975,833.21. On December 30, 1982, Administrative Law Judge William J. Weber issued a decision order, effective February 9, 1983, finding that respondent had committed willful, flagrant, and repeated violations of Section 2 of the Act.

A hearing was held in PACA RC 82-1031, on August 25, 1983, in Kansas City, Missouri, to determine whether Richard S. Zimmerman was an individual "responsibly connected" with Yankee Brokerage, Inc. during the period of May 1981 through November 1981. Richard S. Zimmerman was represented by Mr. William E. Shull, Kearney, Missouri. Mr. Edward M. Silverstein, Office of the General Counsel, represented the Agency. The hearing was held before Harry L. Williams who had been designated the Presiding Officer. The Petitioner and the Agency elected to file briefs.

FINDINGS OF FACT

1. Yankee Brokerage, Inc., a Missouri corporation, had as its business address Post Office Box 12458, North Kansas City, Missouri.

2. Petitioner became a salesman for Yankee Brokerage, Inc. in 1975. As a salesman, he would contact suppliers of produce for the purpose of brokering that produce to firms in the Kansas City, Missouri area.

3. The PACA License Reneawl Application bearing a receiving date of August 8, 1977, shows that Richard Zimmerman was made a Director of Yankee Brokerage, Inc. on January 1, 1977. (Ex. A-3)

4. The License Renewal Application, bearing a renewal date of July 6, 1981, shows that Petitioner was no longer a Director of Yankee Brokerage, Inc., effective August 1, 1981 (Ex. A-7)

5. The Minutes of Annual Meeting of the Board of Directors of Yankee Brokerage, Inc., dated March 7,

1978, shows that Petitioner was ". . . present and accepted the office" of Director and participated in the business meeting that included the election of officers, establishing a bank account, establishing a savings account, and fixing the salary of Roy Zimmerman at $5,000 per month. (Ex. A-10)

6. The Waiver of Notice of Annual Meeting of Shareholders and Shareholders Consent to Corporate Action Without Formal Meeting, dated March 13, 1979, shows that Petitioner was elected as a Director of the corporation. (Ex. A-11)

7. A Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated March 13, 1979, was signed by Petitioner. The Board of Directors ratified the action of the firm's officers during the prior year, elected a slate of officers, and set the salary of Roy Zimmerman at $80,000 per year. (Ex. A-12)

8. The Minutes of a Special Meeting of the Board of Directors Yankee Brokerage, Inc. dated January 18, 1980, indicated Petitioner's participation as a Director at which a resolution was adopted to take out $150,000 in insurance on Petitioner. A Call and Waiver of Notice, signed by Petitioner as a director, waived notice of the meeting, accepted the minutes, and authorized, ratified, and approved the corporation's acts as recorded. (Ex. A-13)

9. The Waiver of Notice of Annual Meeting of Shareholders and Shareholders Consent to Action Without Formal Meeting, dated March 11, 1980, shows that Petitioner was elected as a Director of Yankee Brokerage, Inc. by the corporation's shareholders. (Ex. A-14)

10. A Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated March 11, 1980, signed by

Petitioner, shows that the Board of Directors ratified the actions of the officers for the previous year and elected officers for the following year. (Ex. A-15)

11. A Waiver of Notice of Special Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, dated August 11, 1980, contains a resolution that was adopted authorizing action to have all salaried officers covered by workmen's compensation. Petitioner signed the document as a Director. (Ex. A-16)

12. The Minutes of Special Meeting of Shareholders of Yankee Brokerage, Inc., dated October 13, 1981, records the resignation of Petitioner as a member of the Board of Directors, to be effective immediately. (Ex. A-17)

13. An administrative complaint was filed by the Agency on October 8, 1982, in which it was alleged that the firm had failed to make full payment promptly for 363 lots of perishable agricultural commodities from 61 sellers in the total amount of $975,833.21 during the period of May 1981 through November 1981.

14. The license of Yankee Brokerage, Inc. was revoked by Administrative Order in PACA Docket No. 2-6130 effective February 9, 1983.

15. Mr. J.J. Gardner, Chief, Regulatory Branch, Fruit and Vegetable Division, notified Mr. Richard S. Zimmerman by certified letter dated October 19, 1982, that a disciplinary complaint had been filed against Yankee Brokerage, Inc. and that as an officer, director, or owner of more than ten percent of the corporation's stock, he was deemed to be responsibly connected. (Ex. A-19)

16. Petitioner, through his attorney, William S. Shull, submitted an answer received by the Agency on No-

vember 23, 1982, in which he denied being "responsibly connected" with Yankee Brokerage, Inc. (Ex. A-20)

17. Mr. J.J. Gardner, by letter dated December 22, 1982, to Petitioner's attorney, held that Petitioner was responsibly connected with Yankee Brokerage, Inc. (Ex. A-21)

18. Petitioner, through his attorney, filed a petition for review of that determination, dated January 25, 1983, and requested an oral hearing. (Ex. A-23)

19. An oral hearing was held in Kansas City, Missouri, on August 25, 1983, to provide Petitioner an opportunity to present evidence to refute or rebut the determination by Mr. Gardner of "responsible connection".

CONCLUSIONS

The Perishable Agricultural Commodities Act, 1930, as amended, defines the term "responsibly connected" to mean affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association.

The issue in this proceeding is whether Richard S. Zimmerman was "responsibly connected" with Yankee Brokerage, Inc. during the period of May through October 1981.

Petitioner testified that he started working for Yankee Brokerage, Inc. (Yankee) in 1975 as a salesman and to perform clerical duties. (RTr. 5-6-9)[1] He described his

[1] It was agreed prior to the hearing, by each party's attorney, that the testimony of each witness would be incorporated in each proceeding PACA RC-1030 and PACA RC-1031. The transcript references in PACA RC-1031 will be designated as RTr.

duties as "I'd call shippers and get prices, determine what kind of freight it would take to deliver the merchandise. I'd call and quote it to my customers to sell them. I'd make sure the merchandise got loaded, delivered". (RTr. 14)

Petitioner was unsure as to the exact date when he was appointed to the Board of Directors of Yankee. He stated that, "He (Roy Zimmerman) just told me." (RTr. 6) He testified that his duties did not change, did not attend any Board of Directors meeting, received no additional compensation, and was not asked to make any kind of management decision. (RTr. 6-7) He resigned the position as a director in October 1981 when after Roy Zimmerman left, ". . . I came to understand the position that we were in, the light that it would put me in, I didn't have any other choice but to resign, because I had no control of the situation". (RTr. 8)

Petitioner admitted signing a number of documents as a Director of Yankee. The documents included Minutes of Annual Meetings of the Board of Directors of Yankee, Waiver of Notice of Annual Meetings of Directors and consent to corporate action without formal meetings and waiver of notice of special meeting of directors to corporate action without formal meeting. The board actions were for the purpose of fixing Roy Zimmerman's salary, providing for life insurance for Petitioner in the amount of $150,000, ratifying the actions of the officers during preceding years and to provide for workmen's compensation for each officer. Petitioner testified that he signed the documents because he was instructed to by his father, Roy Zimmerman, and Joe DeCuyper, the firm's attorney and a firm officer.

Petitioner produced several witnesses who testified about the control exerted by Roy Zimmerman over the business activities of Yankee. John Chick, former employee of the DeCuyper law firm, testified that the law

firm prepared Yankee's corporate minutes by a mechanical system and that to the best of his knowledge no director or shareholder meetings were ever held. (Tr. 49-50) However, on cross examination, he could not state with any certainty that meetings were not held. (Tr. 57-58) When asked about Roy Zimmerman's relationship with his children, he testified that he would ". . . make all kinds of crazy deals, that these kids had to live with and try to work their way out of." (Tr. 59) He stated, ". . . Roy Zimmerman, ran the company with a very iron hand and not covered with any kind of velvet glove. It was very much a dominating situation because of not only him physically, but him as a personality." (Tr. 61)

Steven Crain, also an attorney formerly employed by the DeCuyper firm from 1970 to 1976, gave testimony very similar to that of Mr. Chick.

The testimony of Clyde Zimmerman, Petitioner in PACA RC 82-1030, was incorporated by reference in this proceeding. Mr. Zimmerman, also a son of Roy and a Yankee salesman, testified as to the heavy handed control exerted by his father over the produce firm.

Petitioner produced two other witnesses, David B. Zimmerman, who was also employed by Yankee, and Robert C. Reinholt, a partner in a produce firm that did business with Yankee. Both testified as to the strong hand of Roy Zimmerman in controlling Yankee.

Petitioner contends that Yankee was nothing more than the alter ego of his father, Roy Zimmerman, and that Petitioner served as a Director of Yankee because Roy handed out titles and was happy to have him in the business. Petitioner contends that he was a nominal director with no power in management and operation of the firm. Petitioner has advanced considerable argument in support of piercing the corporate veil to show that Yankee was nothing more than the one-man corporation of Roy Zimmerman.

The courts have held ". . . it is the use to which the corporate form is put which controls and the facts in each particular case will determine the course of relief", *Francis O. Day Co.* v. *Shapiro*, 267 F. 2d 669, 674. "The general rule is that the corporate entity should be upheld unless specific, unusual circumstances call for looking beyond the corporate structure", *Anderson* v. *Abbott*, 321 U.S. 349, 362, *Paumier* v. *Barge Bt.* 1793, 395 F. Supp. 1019.

In *Christian and Porter Aluminum Co.*, 584 F. 2d 326, 338 (9th Cir. 1978), the court stated, "The party seeking to have the corporate entity disregarded has the burden of proving that the alter ego theory should be applied." After reviewing all the evidence, it is concluded that Petitioner has not overcome that burden.

Yankee was a Missouri corporation of long standing and it was a closely held family corporation that provided employment for Roy Zimmerman and a number of his immediate family. He brought his sons into the firm as salesmen to represent the firm in dealing with sellers and buyers of produce. Petitioner became an employee in 1975 and was elected to the Board of Directors January 1, 1977. The official file contains copies of Waiver of Notice of Annual Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting, Minutes of a Special Meeting of the Board of Directors Yankee Brokerage, Inc., and Waiver of Notice of Special Meeting of Directors and Directors Consent to Corporate Action Without Formal Meeting. Each of the official corporate documents was signed by Petitioner in his capacity as a Director of Yankee. Each of the Director's actions were substantive business decisions on behalf of Yankee. Petitioner served as a Director of Yankee until October 1981 because as he stated, ". . . I came to the understanding of what the situation was, I saw exactly that set me, in what kind of light." (RTr. 11)

In *Birkenfield* v. *U.S.*, 369 F. 2d 493, (3rd Cir. 1966), the court held Birkenfield responsibly connected. In that case, Birkenfield had been Treasurer, a member of the board of directors of the Ft. Pitt Tomato & Produce Co., Inc. and had owned more than ten percent of the company's outstanding shares of stock. The thrust of Birkenfield's contention before the Department, as well as in the district court, was that he was only nominally such an official or shareholder, and that actual authority was vested in others. The court stated:

> Surely, the relationships of director, officer, or substantial shareholder form a sufficient nexus for the arbitrary conclusion of responsible connection . . . The fact that an individual has not exercised "real" authority in the sanctioned company is not controlling . . .

In *Quinn* v. *Butz*, 510 F. 2d, 743 at 756, the court stated in commenting on the Birkenfield decision that:

> We do not consider our construction of 1(9) inconsistent with either of the two decisions upon which appellees endeavor to support the position that a conclusive presumption is provided . . . In *Birkenfield* v. *United States* . . . where one who admittedly had been a treasurer, director and a 10%-plus stockholder of an offending corporate licensee asserted that "he never had real responsibility in the corporation's affairs". The court held merely that "(T)he automatic exclusion of 'responsibly connected' persons is not irrational or arbitrary under the circumstances."

Petitioner was content to remain a director of Yankee for more than four years. It was only after he learned of the implications of that relationship that he resigned.

In *Quinn* v. *Butz*, 510 F. 2d 743 at 760, the court established the principle that a Petitioner should be afforded the opportunity to rebut the Agency determination of responsible connection, but clearly placed the burden

of proof on the Petitioner. It is my conclusion that Petitioner has failed to sustain that burden. Under the circumstances, Petitioner must be held "responsibly connected" with Yankee Brokerage, Inc.

DECISION

Petitioner, Richard Zimmerman, was responsibly connected under the Perishable Agricultural Commodities Act with Yankee Brokerage, Inc. during the period of May through October 1981.

Done at Washington, D.C., this 1st day of March 1984.

/s/ Harry L. Williams
HARRY L. WILLIAMS
Presiding Officer

SA-23

AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

PACA RC 82-1030

IN RE: CLYDE A. ZIMMERMAN,
Petitioner

FINAL ORDER

On April 24, 1984, the petitioner filed a petition for review of the Presiding Officer's decision in the above captioned proceeding. The Petition for review has been considered in conjunction with the Presiding Officer's decision.

It is hereby ordered that the Presiding Officer's decision is affirmed.

Done at Washington, D.C.
this 23 day of October 1984

/s/ William T. Manley
W. T. MANLEY
Acting Administrator

SA-24

AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

PACA RC 82-1031

IN RE: RICHARD ZIMMERMAN,
Petitioner

FINAL ORDER

On April 24, 1984, the petitioner filed a petition for review of the Presiding Officer's decision in the above captioned proceeding. The Petition for review has been considered in conjunction with the Presiding Officer's decision.

It is hereby ordered that the Presiding Officer's decision is affirmed.

Done at Washington, D.C.
this 17th day of September 1984

/s/ William T. Manley
WILLIAM T. MANLEY
Acting Administrator

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2433

CLYDE A. ZIMMERMAN, *et al.*,
Petitioners,

vs.

WILLIAM T. MANLEY, ETC., *et al.*,
Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE

Petitioners' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 26, 1985

Supreme Court, U.S.
FILED
MAR 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1266

In the Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE A. ZIMMERMAN AND RICHARD ZIMMERMAN,
PETITIONERS

v.

JAMES C. HANDLEY, ADMINISTRATOR,
AGRICULTURAL MARKETING SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

American Textile Manufacturers Institute, Inc. v. *Donovan*, 452 U.S. 490 5

Beth Israel Hospital v. *NLRB*, 437 U.S. 483 5

Birkenfield v. *United States*, 369 F.2d 491 ..... 4, 5, 6

Minotto v. *United States Dep't of Agriculture*, 711 F.2d 406 ..... 3, 4, 5

Pupillo v. *United States*, 755 F.2d 638 ..... 3, 4, 5, 6

Quinn v. *Butz*, 510 F.2d 743 ..... 3, 4, 5, 6

United States v. *Locke*, No. 83-1394 (Apr. 1, 1985) 5

United States v. *Lovasco*, 431 U.S. 783 6

United States v. *Park*, 421 U.S. 658 5-6

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 5

Yankee Brokerage, Inc., 42 Agric. Dec. 576 2

Zwick v. *Freeman*, 373 F.2d 110, cert. denied, 389 U.S. 835 ..... 3-4, 5

Page

Statute and regulation:

Perishable Agricultural Commodities Act,
7 U.S.C. 499a *et seq.* 1
7 U.S.C. 499a(9) 2, 3, 5
7 U.S.C. 499h(b) 2, 5
7 C.F.R. 47.49(f) 5

In the Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE A. ZIMMERMAN AND RICHARD ZIMMERMAN,
PETITIONERS

v.

JAMES C. HANDLEY, ADMINISTRATOR,
AGRICULTURAL MARKETING SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred in holding that substantial evidence supported an administrative sanction imposed under the Perishable Agricultural Commodities Act on the ground that petitioners were "responsibly connected" with a licensee that had violated the Act.

1. a. Petitioners were members of the board of directors of Yankee Brokerage, Inc., a commodities broker formerly licensed under the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*[1] In 1981, Yankee Brokerage failed to make payments totalling almost $1 million on its purchases of over 300 lots of fresh produce. Following issuance

---

[1]Petitioner Clyde A. Zimmerman also was the treasurer and executive vice-president of the firm. Pet. Supp. App. SA2.

of an administrative complaint against Yankee Brokerage, the corporation was found to have "committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b)," which prescribes standards of conduct for licensees. *Yankee Brokerage, Inc.*, 42 Agric. Dec. 576, 577 (1982). See Pet. Supp. App. SA1-SA2, SA13-SA14.

The Agricultural Marketing Service then instituted disciplinary proceedings against petitioners, charging that they were "responsibly connected" with Yankee Brokerage under the terms of the Act and therefore temporarily barred from employment with any licensee except with the approval of the Secretary of Agriculture. See 7 U.S.C. 499h(b). Under the Act, "responsibly connected" is defined to mean, inter alia, "affiliated or connected with" a licensee as a corporate "officer [or] director." 7 U.S.C. 499a(9). Petitioners were afforded evidentiary hearings at which they were given the opportunity to demonstrate that, despite their positions as directors of Yankee Brokerage, they did not, in fact, possess any real authority within the corporation.

At their administrative hearings, petitioners attempted to show that Yankee Brokerage was in substance operated as a sole proprietorship by their father, Roy Zimmerman, and that their membership on the firm's board of directors did not give them any actual authority over its operations. After carefully reviewing petitioners' evidence, the presiding officer rejected their claims. Pet. Supp. App. SA1-SA12, SA13-SA22. The presiding officer concluded that petitioners worked closely with their father and that he could not "envision Roy Zimmerman working in a total vacuum making all of the business and management decisions devoid of any input from the other corporate officers and directors." *Id.* at SA11. He also noted that petitioners, as directors of the corporation, took numerous "substantive actions on behalf of Yankee," and that, even in their role as

salesmen, they had significant "latitude * * * in making business decisions on behalf of the firm." *Id.* at SA10. The presiding officer found in addition that petitioners were "content to remain" on the board of directors for several years, choosing to resign "only after the firm encountered financial problems" and they "learned of the implications of that relationship." *Id.* at SA11, SA21. He concluded that it was "inconceivable that [p]etitioner [Clyde A. Zimmerman] was nothing more than a figurehead" (*id.* at SA10) and that petitioner Richard Zimmerman "failed to sustain [his] burden" of showing "that he was a nominal director with no power in management and operation of the firm" (*id.* at SA22, SA19). The presiding officer therefore decided that petitioners were responsibly connected with Yankee Brokerage within the meaning of the Act.

b. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-2a. Relying on its decision in *Pupillo* v. *United States*, 755 F.2d 638 (8th Cir. 1985), the court of appeals concluded that the agency's orders were "supported by substantial evidence on the record as a whole, [and] that no error of law appear[ed]." Pet. App. 2a.

2. Petitioners contend (Pet. 4-12) that the court of appeals conclusively presumed that they were responsibly connected with Yankee Brokerage on the basis of their positions as directors of the corporation and that this decision conflicts with two decisions of the District of Columbia Circuit, which construe the Act to create only a rebuttable presumption that corporate officers and directors are responsibly connected to their brokerage firms. Although we agree that there is a conflict among the circuits with respect to the interpretation of 7 U.S.C. 499a(9),[2] that

---

[2]Compare *Minotto* v. *United States Dep't of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983) (rebuttable presumption); *Quinn* v. *Butz*, 510 F.2d 743 (D.C. Cir. 1975) (same), with *Pupillo* v. *United States*, *supra* (automatic disqualification) (alternative holding); *Zwick* v. *Freeman*,

conflict has no bearing on the resolution of this case. The agency gave petitioners the benefit of the rebuttable presumption and decided as a factual matter that they had failed to carry their burden of proof. The court of appeals' brief decision also appears to rest on the alternative ground that petitioners did not rebut any presumption raised by the Act: the decision refers to "substantial evidence" supporting the agency's orders, and the case on which it relies, *Pupillo* v. *United States, supra*, expressly held, as an alternative to automatic disqualification, that the corporate officer there had failed to carry his burden of proof under the District of Columbia Circuit's rebuttable presumption approach. 755 F.2d at 644-645. Since petitioners did not prevail even under the more generous view of the Act, this case would not be an appropriate one in which resolve the conflict over its interpretation.

a. In *Quinn* v. *Butz*, 510 F.2d 743 (D.C. Cir. 1975), the court held that the Act's definition of "responsibly connected" in terms of positions such as corporate officer and director raises only a prima facie presumption that a person within the definition did in fact possess authority over the firm and that such a person has "the burden of proving, but also the prerogative of attempting to prove," that he was without "personal fault or a realistic capacity to counteract or obviate the fault of others." *Id.* at 752, 756. In *Quinn*, the court required the agency to provide a hearing for an individual who contended that he "did not to any extent participate in the management of the company's affairs" and "was totally without power to do so." *Id.* at 753. Similarly, in *Minotto* v. *United States Dep't of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983), the court required an "actual,

---

373 F.2d 110 (2d Cir.), cert. denied, 389 U.S. 835 (1967) (automatic disqualification); *Birkenfield* v. *United States*, 369 F.2d 491 (3d Cir. 1966) (same).

significant nexus with the violating company" and held that a person who was "essentially a clerical employee" was not subject to disqualification under the Act. *Id.* at 409.

Here, petitioners were given the evidentiary hearing required in *Quinn*.[3] The presiding officer thoroughly discussed the testimony of petitioners' witnesses, and he concluded that petitioners did, as a factual matter, exercise significant authority within Yankee Brokerage. See pages 2-3, *supra*. There can be no doubt that the court of appeals was correct in determining that substantial evidence supports the agency's orders. See, *e.g., American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 522-523 (1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). Review by this Court of such a factbound decision is obviously unwarranted. See, *e.g., Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 507 (1978), quoting *Universal Camera Corp.*, 340 U.S. at 491 (" 'This Court will intervene only in * * * the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied.' ").

b. In any event, the statute surely contemplates that any person within the definition of "responsibly connected" in 7 U.S.C. 499a(9) be subject to the disqualification provisions of 7 U.S.C. 499h(b). See *Pupillo* v. *United States*, 755 F.2d at 643-644; *Zwick* v. *Freeman*, 373 F.2d 110, 119 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *Birkenfield* v. *United States*, 369 F.2d 491, 494-495 (3d Cir. 1966). The plain language of the statute makes the disqualification automatic—it does not require a hearing or other case-by-case inquiry into degree of fault. The definition of

---

[3]Indeed, regulations promulgated following the decision in *Quinn* require such a hearing on request of the individual involved or if the presiding officer determines that one is necessary. 7 C.F.R. 47.49(f); see *Minotto*, 711 F.2d at 407 n.3.

"responsibly connected" does not establish an evidentiary presumption, rebuttable or otherwise, for there is no indication that Congress was in fact concerned with individualized notions of actual fault. Cf. *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 18; *United States* v. *Park*, 421 U.S. 658, 670-671 (1975). Indeed, the legislative history shows precisely the opposite. See *Pupillo*, 755 F.2d at 643. Finally, the "obviously rational relationship between officership [or directorship] in a corporation and responsible connection with the corporation" (*Quinn*, 510 F.2d at 756 n.85), combined with the voluntary nature of an individual's decision to accept and continue holding such a position with a regulated entity (see *Birkenfield*, 369 F.2d at 494-495), amply support the constitutionality of the civil sanction established by the Act.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1986

---

[4]In any event, petitioners have waived their constitutional objection by failing to present it below. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).